

**STATEMENT OF
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BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS**

MAY 2, 2017

Good morning, Chairman Roe, Ranking Member Walz, Members of the Committee. Thank you for inviting us here today to present our views on a bill that would take critical action necessary to modernize and improve the Department of Veterans Affairs (VA) claims appeal process. Joining me today is David R. McLenachen, Director of the Appeals Management Office, Veterans Benefits Administration.

Thank you for the opportunity to come before you today to discuss the current VA appeals process and the pressing need for reform. I believe it is critical for Veterans that we all work together and gain consensus on a way forward to reform the VA appeals process.

Modernizing the appeals process is a top priority for VA. Although Veterans are waiting approximately 116 days for a decision on VA disability compensation claims, they are waiting an average of 3 years for a final decision if they choose to appeal. Moreover, those Veterans who choose to continue their appeal to the Board are waiting an average of 6 years from the date that they initiated their appeal for a decision, and the Board decision may not even resolve the appeal. The draft bill being considered today would provide much-needed comprehensive reform for the VA appeals process to ensure that Veterans receive a timely, final VA decision on their claims. It would

replace the current, lengthy, complex, confusing VA appeals process with a new appeals process that makes sense for Veterans, their advocates, VA, and stakeholders. VA supports the intent of this bill; however, we have some concerns with certain provisions in the bill as drafted, such as the provisions that would remove finality from the process upon judicial review and require the Secretary to certify that he has the resources necessary to timely process appeals in the future. We look forward to the opportunity to work with the Committee to address those concerns.

The current VA appeal process, which is set in law, is broken and is providing Veterans a frustrating experience. In the current process, appeals have no defined endpoint and require VA staff to engage in a continual loop of gathering evidence and re-adjudicating that information based on that new evidence. This continuous process of gathering evidence and readjudication can add years to the appeals process, as appeals churn between the Board and the AOJ. All of this has resulted in a system that is complex, inefficient, ineffective, and confusing. Additionally, it splits jurisdiction of appeals processing between the Board and the agency of original jurisdiction (AOJ), which is typically the Veterans Benefits Administration (VBA). Due to this complex and inefficient process, Veterans wait much too long for final resolution of their appeal. Without significant legislative reform to modernize the appeals process, VA projects that wait times and the cost to taxpayers will only increase.

As VA has increased claims decision output in VBA over recent years, appeals volume has grown proportionately. Between FYs 2012 and 2017, the number of pending appeals climbed by 40 percent to more than 460,000 today

Comprehensive legislative reform is required to modernize the VA appeals process and provide Veterans a decision on their appeal that is timely, transparent, and fair. VA continues to work collaboratively with a wide spectrum of stakeholder groups to reconfigure the VA appeals process into something that provides a timely, transparent, and fair resolution of appeals for Veterans and makes sense for Veterans, their advocates, stakeholders, VA, and taxpayers. We believe the engagement of those organizations that participated ultimately led to a stronger proposal, as we were able to incorporate their feedback and experience having helped Veterans through this complex process. The result of this collaborative work was a new appeals process, with the same fundamental features as the process described in section 2 of the draft bill, which would provide Veterans with timely, fair, and quality decisions. VA is grateful to all of the stakeholders for their contributions of time, energy, and expertise in this effort.

The draft bill would result in a new appeals framework and processes that feature differentiated lanes, which give Veterans clear options after receiving an initial decision on a claim. One lane would be for review of the same evidence by a higher-level claims adjudicator in the AOJ; one lane would be for submitting new and relevant evidence with a supplemental claim to the AOJ; and one lane would be the appeals lane for seeking review by a Veterans Law Judge at the Board. In this last lane, intermediate and duplicative steps currently required by statute to receive Board review, such as the Statement of the Case (SOC) and the Substantive Appeal, would be eliminated. Furthermore, hearing and non-hearing options at the Board would be handled on separate dockets so these distinctly different types of work can be better managed. As a result of this new design, the AOJ, such as VBA, would be the claims adjudication

agency within VA and the Board would be the appeals agency. This design would remove the confusion caused by the current process, in which a Veteran initiates an appeal in the AOJ but the appeal is really a years-long continuation of the claim development process. It would ensure that all claim development occurs in the context of a supplemental claim filed with AOJ, which the AOJ can quickly adjudicate, rather than in an appeal.

Currently, VA has a statutory duty to assist the Veteran in the development of a claim for benefits. This duty includes obtaining relevant Federal records, obtaining other records identified by the claimant, and providing a medical examination if VA determines that the claim requires such an examination. This new design contains a mechanism to correct any duty to assist errors by the AOJ. If the higher-level claims adjudicator or Board discovers an error in the duty to assist that occurred before the AOJ decision being reviewed, the claim/appeal would be returned to the AOJ for correction unless the claim/appeal could be granted in full. However, the Secretary's duty to assist would not apply to the lane in which a Veteran requests higher-level review by the AOJ or review on appeal to the Board. The duty to assist would, however, continue to apply whenever the Veteran initiated a new claim or supplemental claim. Moreover, the bill would require VA to modify its claims decision notices to ensure they are clearer and more detailed. This notice would help Veterans and their advocates make informed choices as to which review option makes the most sense.

This disentanglement of processes would be enabled by one crucial innovation. In order to make sure that the Veteran fully understands the process and can adapt to changed circumstances, a Veteran who is not fully satisfied with the result of any lane

would have 1 year to seek further review while preserving an effective date for benefits based upon the original filing date of the claim. For example, a Veteran could go straight from an initial AOJ decision on a claim to an appeal to the Board. If the Board decision was not favorable, but it helped the Veteran understand what evidence was needed to support the claim, then the Veteran would have 1 year to submit new and relevant evidence to the AOJ in a supplemental claim without fearing an effective-date penalty for choosing to go to the Board first.

The framework proposed in the draft bill has many advantages. It provides a streamlined process that allows for early resolution of a Veteran's appeal while also generating long-term savings for taxpayers. The lane options allow Veterans to tailor the process to meet their individual needs and control their VA experience. It also enhances Veterans' rights by preserving the earliest possible effective date for an award of benefits, regardless of the option(s) they choose, as long as the Veteran pursues the same claimed issue in any of the lanes within the established timeframes. By having a higher-level review lane within the VBA claims process and a non-hearing option lane at the Board, both reviewing only the record considered by the initial claims adjudicator, the new process provides a feedback mechanism for targeted training and improved quality in VBA.

Beyond stopping the flow of appeals into the existing broken system, the bill provides two opt-ins to ensure that as many Veterans as possible benefit from the streamlined features of the new process. These opt-ins would provide opportunities to take advantage of the new process for all Veterans who receive a decision during the 1-year period prior to the effective date of the law and for all other Veterans who receive

an SOC or Supplemental Statement of the Case (SSOC) in a legacy appeal after the effective date of the law. While VA believes that the opt-in for Veterans who receive an SOC or SSOC after the effective date of the law could be accomplished through regulation, VA does not object to the inclusion of this into the bill.

While VA strongly supports the fundamental features of the new process outlined in the draft bill, we have concerns with some aspects of the proposed legislation as presently drafted, as discussed below. VA strongly opposes a substantive change that would make the effective date protection afforded by the filing of a supplemental claim within 1 year of a decision, applicable to supplemental claims filed within 1 year of a decision by the United States Court of Appeals for Veterans Claims, the United States Court of Appeals for the Federal Circuit, or the United States Supreme Court as it is beyond the scope of VA's decision process. Additionally, this change is contrary to VA's policy interest in encouraging dissatisfied claimants to stay within VA unless it is truly necessary to go to a higher court.

With regard to applicability and the proposed certification of the readiness to carry out the new system by the Secretary, the requirement that the Secretary submit a statement to Congress that he has the resources necessary to timely operate the system is problematic, given the annual budget cycle. While VA will be prepared to implement the new system at the end of the 18-month period prescribed in the bill and shut off the flow of appeals to the broken process, the Secretary cannot predict the outcome of future budget cycles. Moreover, if the bill was enacted with this provision, it would create significant uncertainty in implementing the opt-in component of the law. We note that the bill grants claimants a procedural right to elect to participate in the

modernized appeals system as of one year before the applicability date. The applicability date in this bill is necessarily indeterminate because, without knowing when the Secretary will be able to certify under subsection (x)(1)(A)(ii) that VA has the resources it needs to operate the modernized system, it is not possible to know when the one year period allowing claimants the right of election begins. We would be happy to work with the Committee to discuss alternative approaches to the applicability date of the law.

The draft bill also adds notice requirements to higher-level review and Board decisions, for the purpose of explaining whether the claimant submitted evidence that was not considered, and if so, why it was not considered and what the claimant or appellant can do to have that evidence considered. VA views this addition as unnecessary, as a claimant who had elected either a higher-level review or an appeal to the Board would have already received notice addressing all lane options in the new process, including restrictions on the submission of new evidence. They would also be aware of the option to file a supplemental claim, where they would have the opportunity to submit new evidence for consideration by the AOJ. Additionally, the issue of how to handle improperly submitted evidence is an administrative matter that would best be determined by VA.

Lastly, the draft bill includes reporting requirements that we believe could be adjusted to be less onerous but still provide valuable information to the Congress. VA is glad to work with the Committee to discuss these requirements, and how they can be shaped to provide robust information useful for your oversight should the bill be enacted, but that would reflect an efficient use of administrative resources.

VA is poised to provide technical assistance on several other aspects of the proposed legislation. We appreciate any opportunity to work with Congress to further refine this legislation.

Mr. Chairman, this concludes my statement. Thank you for the opportunity to appear before you today. We would be pleased to respond to questions you or other Members may have.